IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. [illegible]

[illegible]

[illegible]

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[illegible]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

JAEGER MOTOR CAR COMPANY, *et al.*, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, petitioners and appellants in the Courts below, pray that a writ of certiorari issue to review the judgments herein of the United States Court of Appeals for the Seventh Circuit.

Said judgments, affirming the decisions of the Tax Court of the United States, were entered on November 16, 1960. The Opinion of the Court of Appeals was released on November 16, 1960. There was no motion, request or petition for rehearing.

In the Court of Appeals, judgments were entered in five separate dockets, each of which involved the Com-

missioner of Internal Revenue as respondent and the following named persons as petitioner:

Court of Appeals Number	Name
12924	Jaeger Motor Car Company
12925	Anna Jaeger
12926	Anna Jaeger, Administratrix of the Estate of Anthony A. Jaeger, Deceased
12927	Anna Jaeger, Administratrix of the Estate of Anthony A. Jaeger, Deceased and Anna Jaeger
12928	Jaeger Motor Car Company

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court of the United States is unreported officially, but is reported unofficially at 17 T.C.M. 1098. An official amendment is reported unofficially at 18 T.C.M. 306. The Memorandum Findings of Fact and Opinion are printed in the record below (Appendix for Petitioners—p. 343). The opinion of the Court of Appeals for the Seventh Circuit (Appendix, *infra*, pp. 15-31), is reported at .... F. 2d .... (CA7), 60-2 U.S.T.C. ¶9793.

JURISDICTION

The judgments of the Court of Appeals for the Seventh Circuit were entered November 16, 1960. This Court has jurisdiction under 28 U.S.C. Sections 1254 and 2101.

QUESTIONS PRESENTED

1. Whether improvements made by a corporate lessee upon property leased from its controlling stockholder, constitute taxable income to the lessor when made or at the termination of the lease under the provisions of Section 23(b)(11), Internal Revenue Code of 1939, and the rule of *M. E. Blatt Co. v. United States*, 305 U.S. 267, (1938)?

2. If the answer to the first question is in the negative, whether the corporate lessee is entitled to a proper allowance for amortization of leasehold improvements?

STATUTES AND REGULATIONS INVOLVED

Section 22(b)(11), Internal Revenue Code of 1939, 26 U.S.C. 22(b)(11):

Section 22(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * *

(11) *Improvements by Lessee on Lessor's Property.*—Income, other than rent, derived by a lessor of real property upon the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee.

* * * *

Regulations 111, Section 29.22(b)(11)-1, Title 26, Part 29, C.F.R. Section 29.22(b)(11)-1:

Exclusion from gross income of lessor of real property of value of improvements erected by lessee.—Income derived by a lessor of real property upon the termination, through forfeiture or otherwise, of the lease of such

property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income. However, where the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such buildings or improvements represent such liquidation. The exclusion applies only with respect to the income realized by the lessor upon the termination of the lease and has no application to income, if any, in the form of rent, which may be derived by a lessor during the period of the lease and attributable to buildings erected or other improvements made by the lessee. It has no application to income which may be realized by the lessor upon the termination of the lease but not attributable to the value of such buildings or improvements. Neither does it apply to income derived by the lessor subsequent to the termination of the lease incident to the ownership of such buildings or improvements.

Section 22(a), Internal Revenue Code of 1939, 26 U.S.C. 22(a):

Section 22. Gross Income.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 23(1), Internal Revenue Code of 1939, 26 U.S.C. 23(1):

Section 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * *

(1) *Depreciation.* — A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

STATEMENT OF THE CASE

This case below involved a number of complex issues, most of which are no longer in dispute. The only issues remaining are: (1) the taxability to the lessor of the value of improvements made by the lessee upon land leased on a year-to-year basis from its principal stockholder; and (2) if the holding of the Courts below is erroneous, the determination of the proper allowances to the corporation-lessee for amortization of leasehold improvements. Only facts pertinent to those issues are outlined herein.

For the years 1945, 1946 and 1947, Anthony A. Jaeger, decedent of the fiduciary appellant, filed individual income tax returns. For the years 1948 through 1951, Anthony A. Jaeger and Anna Jaeger, husband and wife, filed joint individual income tax returns. Jaeger Motor Car Company, the corporate appellant, a Wisconsin corporation organized in 1934, filed corporation income tax returns for the years 1946 through 1953. At all times pertinent hereto Anthony owned 81.2% of the outstand-

ing stock of the corporation, and the balance of the stock was held by members of his family. Anthony was president of the corporation for all years under consideration.

On December 31, 1936, Anthony leased to the corporation certain land located on North 27th Street, Milwaukee, Wisconsin for one year at a rental of $500 per month, the company also to pay all real estate taxes, insurance, and repairs. On December 31, 1937, the directors of the corporation authorized a lease for another year at $250 per month, but no written lease was executed. The corporation then continued to occupy the same premises throughout 1938 and 1939 and continued to pay $250 per month.

On May 6, 1940, the directors authorized a lease agreement at $250 per month through the month of March 1940 and $500 per month for the remainder of 1940, plus all taxes and insurance. No written lease was executed. The corporation continued to pay Anthony $500 per month rent and pay all taxes and insurance through the years in issue. No written lease was executed in any later year. The company occupied additional facilities owned by Anthony including facilities located at 1823-27 and 1835-49 North 27th Street, Milwaukee, Wisconsin.

Beginning in 1946, the company's business expanded rapidly and outgrew its facilities. The corporation's source of new automobiles, Pontiac division of General Motors, objected to the company's premises and recommended expansion. And a portion of the company's premises became unsafe. The Company requested that Anthony improve the facilities it rented from him.

In December 1946 a builder was employed to correct certain weaknesses and add improvements to the main building. Bills totaling $16,867.56 were paid by com-

pany checks and charged to Anthony's personal account on the company books. On May 6, 1947, Anthony suggested that the company take over these liabilities as the improvements had been requested of him by the company in order that it could centralize its business; Anthony agreed not to increase the rent. On November 30, 1947, the above charge was transferred on the company books to "Leaseholds and Improvements".

The corporation minutes indicated that Anthony, as president, and all the directors considered it essential that substantial sums be expended for improvements required by the corporation for the operation of its automobile business.

During the remainder of 1947 and throughout 1948 through 1951, the company paid for additional improvements to properties it rented from Anthony. Some of the improvements paid for by the company expanded facilities used by it in its business. The company paid the following amounts for capital improvements to Anthony's properties:

1947	$26,131.92
1948	70,977.42
1949	43,976.29
1950	11,486.76
1951	2,095.00

All of these improvements were charged on the company's books to "Leaseholds and Improvements" or to "Building Maintenance". Those portions charged to "Building Maintenance" should properly have been capitalized as part of "Leaseholds and Improvements".

By amended answer to the petition in the Tax Court, respondent alleged that all of the amounts spent by the company, as set forth above, were taxable to Anthony as dividends received in the respective years. The Tax

Court found as a fact that the improvements constituted dividend income to Anthony in the years in which they were made. The Court of Appeals for the Seventh Circuit agreed with that conclusion.

The question of the proper rate of amortization of the leasehold improvements by the corporation was not reached since the decision was to the effect that the company did not own those improvements. Respondent filed a protective cross-petition for review by the Court of Appeals on this issue, in the event the appellate court should have reversed the Tax Court. The Court of Appeals did not pass on this issue.

REASONS FOR GRANTING THE WRIT

I.

The Lower Court decision is in direct conflict with the statute, 26 U.S.C. Section 22(b)(11) and/or the decision of the United States Supreme Court in *M. E. Blatt Co. v. United States,* 305 U.S. 267, 59 S. Ct. 186 (1938).

In the *Blatt* opinion, this Court held that no income was realized by the lessor in the taxable year in which improvements were made upon the lessor's premises by the lessee. Although the determination of the amount of income by the Commissioner in that case was somewhat peculiar (but in accordance with earlier regulations, Regs. 77, Art. 63), the holding was general. Any enhancement of value of the premises due to improvements thereon did not represent realized income of the lessor. It was further held that the improvements in question did not constitute rent; had they been equivalent to rent, apparently a different conclusion would have been reached.

In 1940, the opinion in *Helvering v. Bruun*, 309 U.S. 461 (1940), reviewed the *Blatt* case and succinctly stated the *Blatt* rule as:

> * * * any enhancement in the value of the realty in the tax year was not income realized by the lessor within the Revenue Act.

Proceeding on that premise, this Court concluded that the lessor realized income in the year the lessee forfeited the leasehold with improvements previously added thereto by the lessee. After this decision there was no question that the broad definition of gross income in section 22(a) of the 1932 Revenue Act, c. 209, 47 Stat. 169, 178, required that the value of improvements made by the lessee be considered taxable income at the termination of the lease. Various courts of appeals followed that rule, *Lewis v. Pope Estate Co.* (CA9, 1940), 116 F. 2d 328, certiorari denied 314 U.S. 630; *Greenwood Packing Plant v. Commissioner* (CA2, 1942), 131 F. 2d 787; *Trask v. Hoey* (CA2, 1949), 177 F. 2d 940; and Regulations 103, section 19.22(a)-13 was amended accordingly by Treasury Decision 4980, 1940-2 C.B. 42.

In 1942, Congress saw fit to limit the application of the *Bruun* case to those situations where the improvements represented rent; see H. Rept. No. 2333, 77th Cong., 2nd Sess., p. 69, 1942-2 C.B. 425, and S. Rept. No. 1631, 77th Cong., 2d Sess., p. 78, 1942-2 C.B. 564. The result of the Congressional action was Section 22(b)(11), Internal Revenue Code of 1939, quoted hereinabove. Under the modified rule, and under the *Blatt* case, the lessor realizes no taxable income in the year when improvements are made upon his property by the lessee or upon termination or forfeiture of the leasehold, unless such improvements are, in fact, intended as rent.

Treasury Regulations 111, section 29.22(b)11-1, Title 26, Part 29 C.F.R., section 29.22(b)11-1, quoted hereinabove, reflects this same limitation. See I.T. 4009, 1950-1 C.B. 13. Those regulations are still found verbatim in the current regulations, section 1.109-1, Title 26, Part 1, C.F.R., section 1.109-1, although the revenue laws have experienced several substantial revisions in the interim.

It is to be noted that section 22(b) 11, and inferentially the *Blatt* case, included in taxable income the value of improvements by a lessee on a lessor's property if such improvements constituted rent; all other possible variations of "gross income" were apparently to be treated the same. There is no distinction between compensation, interest, profit, dividends (even duly declared dividends), or any of the other specific or general types of income enumerated in section 22(a), Internal Revenue Code of 1939, quoted hereinabove. The *only* exception is rents. Further, there is no reference in any of these provisions to matters of control of or relationship between lessor and lessee, cf. section 24(b), Internal Revenue Code of 1939. Also, there is no suggestion that length of the lease is of any importance.

The findings of the Tax Court, the trier of fact herein, with which the Court of Appeals found no fault (Appendix, *infra*, pp. 26-29), were that the corporation leased the property from the stockholder on a year to year basis (Appendix for Petitioners—p. 382). There was no finding that any of the improvements were intended to or did, in fact, represent rent; on the contrary, it was held that the cost of improvements (not even the enhancement in value) constituted dividend income (Appendix for Petitioners—p. 384).

Although a specific statute and a specific regulation and a specific ruling of this Supreme Court do not, under the circumstances, permit it, the Courts below have treated improvements by a lessee to a lessor's property as taxable income under section 22(a).

There is no vice in allowing these improvements to be presently free of tax. The basis of the property is not increased by the value of the improvements, section 113(c), Internal Revenue Code of 1939, even if the Court of Appeals is correct in its observation that the improvements were available to the lessor "to take if he desired" (Appendix, *infra*, p. 27). Both Congress and this Court intended to postpone the tax until disposition of the improved property, see H. Rept. No. 2333, *supra*; S. Rept. No. 1631, *supra*.

Accordingly, this Court should grant this petition because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. In accomplishing by indirection what it could not do directly, the rule of the *Blatt* case, and of the statute, has been sharply restricted. Because of the potential general application of such novel restrictions, the Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

II.

The Lower Court decision herein is in conflict with the decision by the Court of Appeals for the Ninth Circuit in *Commissioner v. Cunningham*, 258 F. 2d 231 (1958), affirming 28 T.C. 658 (1957).

In the *Cunningham* case, the controlling stockholder of a corporation leased her property to the corporation at a nominal rent. The corporation minutes recited that the corporation would construct substantial improvements needed by it in its business. A rental agreement took effect on January 2, 1946, but was not reduced to writing until 14 months later. The corporation constructed improvements needed by it and continued paying the nominal rental.

The Commissioner alternatively and inconsistently contended that the value of the improvements was taxable income either when made or on termination of the lease. The Tax Court, citing the *Blatt* case and the same statutes and regulations quoted hereinabove, held that there could be no income at the time the improvements were made or upon termination of the lease, unless *such improvements represented rent.* The Tax Court then determined, as a fact, that the improvements did not constitute rent. Accordingly, the Commissioner was overruled on both alternative contentions.

In rejecting the Commissioner's appeal in *Cunningham*, the Court of Appeals for the Ninth Circuit reviewed the authorities, *M. E. Blatt Co. v. United States, supra, Helvering v. Bruun, supra,* Section 22(b)(11), *supra,* and applicable regulations, and affirmed the trial court.

In the instant cases, a controlling stockholder leased property to his corporation, but not at a nominal rental. The corporation minutes (Appendix for Petitioners—pp. 359-360) recited the needs of the corporation for improvements needed in its business and that the corporation would undertake such improvements. The lease was on a year-to-year basis, as the lease must have been in *Cunningham* prior to execution of the written lease. The corporation herein made improvements needed by it and continued to pay the same monthly rental.

Both trial and appellate courts in *Cunningham* agreed that under applicable rules of law, only improvements constituting *rent* could be income. This is exactly contrary to the holding of the Tax Court and the Court of Appeals herein, which found taxable income from improvements on remarkably similar facts without even a suggestion that such improvements were, in fact, rent.

The lower courts herein made a particular point of the ready availability of the improvements to the lessor (Appendix for Petitioners—p. 382; Appendix, *infra*, p. 27). Interestingly, in *Cunningham*, the Commissioner took the opposite position, contending that lease cancellation brought into effect the exclusion rules but not normal expiration. The Court of Appeals, citing the Committee Reports cited herein and the *Bruun* case, could see no distinction; Congress had consciously postponed taxation until the lessor disposed of the property, and secured disposable cash thereby to pay the taxes. The same policy is pertinent here.

Although the Courts below sidestepped the problem by calling these improvements dividends, such action does not affect the applicable rules. Had the corpora-

tion duly declared a dividend payable to its lessor-stockholder in the form of improvements, the applicable rules of law would exclude such improvements from taxable income in the year when made, and in the year the lease terminated. Such rules controlled in *Cunningham* and should be applied here.

Accordingly, this Court should grant this petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit because it has rendered a decision herein which is in conflict with the decision of the Court of Appeals for the Ninth Circuit on the same matter.

The second question presented, that concerning amortization of the leasehold improvements by the corporation, does not, in itself, present additional reasons for granting this petition. However, if the lower courts herein committed error, that question must then be disposed of pursuant to section 23(1), Internal Revenue Code of 1939, 26 U.S.C. section 23(1).

Respectfully submitted,

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Date: February 10, 1961

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960—SEPTEMBER SESSION, 1960

Nos. 12924-12928

JAEGER MOTOR CAR COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANNA JAEGER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANNA JAEGER, Administratrix of the Estate of Anthony A. Jaeger, deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANNA JAEGER, Administratrix of the Estate of Anthony A. Jaeger, deceased, and ANNA JAEGER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JAEGER MOTOR CAR COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On petition for review of decisions of the Tax Court of the United States.

November 16, 1960

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* Anthony A. Jaeger and Anna Jaeger, husband and wife, filed individual income tax returns for the calendar years 1945, 1946 and 1947, and joint income tax returns for the calendar years 1948 through 1953. Anna Jaeger is involved only because of the joint returns which she filed with her husband. Jaeger Motor Car Company (hereinafter called "Motor Company" or "J.M.C."), a Wisconsin corporation, of which Mr. Jaeger was president and the majority stockholder, filed income tax returns for the years 1945 through 1953.

These consolidated proceedings involved deficiencies and additions to tax as determined by the Commissioner of Internal Revenue. In large part the facts were stipulated. The Tax Court found that there were deficiencies in income taxes and deficiencies in additions to tax for the years 1945, 1946, 1947 and 1948. The petitioner sought review in this Court.

No issue is taken respecting the deficiency assessments against Jaeger Motor Car Company or Mr. Jaeger for 1946, 1947 or 1948. It is contended, however, that deficiency assessment for 1945 is barred by the Statute of Limitations, and that findings of fraudulent returns by Mr. Jaeger in 1945, 1947 and 1948, and by the Motor

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[1]The stockholdings of the corporation at all times in issue prior to December 31, 1947, were as follows:

Anthony A. Jaeger	203 shares
Anna Jaeger	31 shares
Clara Petrie (Kilbourn)	6 shares
Wilma Petrie	5 shares
Edna Jaeger	5 shares
Total	250 shares

Company in 1945, 1946, 1947 and 1948, are erroneous and unsupported by the evidence.[2]

(Footnote 1 Cont'd)
On and after December 31, 1947, the stockholdings of JMC were as follows:

Anthony A. Jaeger	812 shares
Anna Jaeger	123 shares
Clara Petrie (Kilbourn)	24 shares
Wilma Petrie	20 shares
Edna Jaeger	20 shares
Total	1,000 shares

[2]The contested issues as set up by the petitioners are:

1. The court's findings that Anthony filed false and fraudulent returns in the years 1945, 1947 and 1948 were erroneous and the findings are unsupported by clear or convincing evidence.
2. The court's findings that J.M.C. filed false and fraudulent returns for the years 1945, 1946, 1947 and 1948 were erroneous and the findings are unsupported by clear and convincing evidence.
   a. Court erred in denying motion to reopen and accept evidence of 1945 O.P.A. case and reconsider finding of fraud in 1945.
3. The assessment of tax deficiencies against Anthony and J.M.C. for the year 1945 is barred by the Statute of Limitations.
4. The court finding that J.M.C. failed to report income from the sales of cars where the profit was retained by various members of the family in the year 1946 through 1948 in the amounts determined is erroneous; and his conclusion that said profit was attributable to J.M.C. was erroneous.
5. The court's finding that "in at least eleven transactions during 1946 through 1948 cars were billed out to members of the family as a device for preventing profit on the subsequent sale being reported on company books" is erroneous and unsupported by clear and convincing evidence.
   a. The Court's denial of petitioner's motion to strike respondent's Exh. FF and the testimony of Agent Schultz in relation thereto, was error.
6. Improvements to Anthony's property by J.M.C. as lessee, were leasehold improvements, subject to depreciation deduction by J.M.C., and did not constitute dividends to Anthony.
   a. The uncontradicted evidence established that the appropriate rate of depreciation is a composite rate of 5% per annum.
7. Interest accrued payable to Jaeger Finance Corporation to Anthony and Anna was not taxable income to them until received by them in 1950.
8. Insurance commissioner assigned by Anthony to J.M.C. and J.F.C. were their income as reported by them, and not Anthony's income.

In his deficiency notices, the Commissioner determined unreported income by net worth computation.[3] The notices of deficiency for 1945 taxes were mailed to Mr. Jaeger and the Motor Company on December 29, 1954, and January 18, 1955, respectively. No consents extending the period of assessment were filed for the calendar year 1945. The petitioners, as indicated, contended that assessment of tax deficiencies for 1945 was barred by the Statute of Limitations. The Tax Court found that the three-year limitation was inapplicable here because a portion of the deficiency for each year, 1945 through 1948, was due to fraud with intent to evade tax.

Where a return is false and fraudulent, with intent to evade tax, assessment and collection of deficiency may be made at any time. Internal Revenue Code of 1939, § 276(a). Fraud is a question of fact. Determination of fraud must be supported by substantial evidence. Where there is substantial evidence to support the conclusion of the Tax Court, we may not substitute our judgment of the fact of fraud for that of the Tax Court. *Helvering v. Kehoe*, 309 U.S. 277, 279 (1940) and cases therein cited. *Prokop v. Commissioner of Internal Revenue*, 7 Cir., 1958, 254 F. 2d 544, 555.

The petitioners argue that the Commissioner's net worth determination was accepted by the Tax Court, not because it was affirmatively proved accurate, but because

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[3] In the deficiency notices the Commissioner determined by net worth computation that Anthony and the company had unreported income in the following amounts:

1945	$10,115.14
1946	20,252.98
1947	20,090.56
1948	18,476.33

Minor changes in the above figures were made by the Commissioner in the amendments to his answers in the Tax Court.

petitioners were unable to demonstrate that it was wrong. The petitioners contend that the Tax Court thus committed error because in sustaining an imposition of the fraud penalty, the burden is upon the Commissioner to show fraud by clear and convincing evidence.

The Tax Court found numerous instances of descrepancies between the taxpayers' books and accounting records and the actual income received. This satisfied the Tax Court that the taxpayers' books and records were inaccurate and inadequate for determining the tax liability. Computation of income by the net worth method was, therefore, justified. *Holland* v. *United States*, 348 U.S. 121, 131 (1954); *H. A. Hurley* v. *C.I.R.*, 22 T.C. 1256, 1261 (1954) affirmed 6 Cir., 1956, 233 F. 2d 177.

Most of the items comprising the Commissioner's net worth computation were stipulated. One contested item was the cash on hand on December 31, 1944. The Commissioner introduced evidence to show that in 1926, when Mr. Jaeger opened his automobile dealership, his net worth was about $12,000, and that substantially all his cash was used to finance the dealership. He closed his personal checking and savings account. In his testimony, Mr. Jaeger said that he did not draw all his money out in 1926, that he left some money in the bank. He and his wife had no personal savings account from 1928 until May 11, 1943, and no personal checking account from 1928 until December 19, 1946. Mr. Jaeger maintained a checking account as a sole proprietorship under the name of Jaeger Motor Car Company from November 23, 1926 until December 4, 1934 when Jaeger Motor Car Company, the corporation, took over the dealership. The corporation had opened a checking account July 10, 1934, and maintained it thereafter.

The Tax Court found that when in its early years the business was in a weak cash position with repeated bank overdrafts, all Mr. Jaeger's available cash, including money borrowed by him, was placed in the business; and that he had no cash accumulation at the end of 1936. Mr. Jaeger had large outstanding loans in 1936 and the years immediately following.[4]

Mr. Jaeger, in April, 1952, at an informal conference with the Commissioner's investigators, stated that he had $5,000 cash at the end of 1944. Later in 1952, Mr. Jaeger's accountant submitted a statement in which cash on hand was estimated at $50,000, and then corrected to $56,000, for December 31, 1944. In another statement Mr. Jaeger placed the cash on hand at a figure of $35,000. In his petition to the Tax Court, he alleged it to be $51,000. In his testimony, he said at the trial, once that he did not know the figure, and another time that he estimated it at $35,000.

Mr. Jaeger offered several explanations of the source of this cash. He described it as accumulated from salary and earnings, in 1940 through 1945. When investigation negatived that assertion, he said he had cash on hand when he went into business in 1926 and had accumulated more cash since then. This was not consistent with his bank overdrafts and borrowing, or with his further testi-

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[4]The Tax Court found these to be as follows:

1936	$27,847.16
1937	40,980.97
1938	30,480.97
1939	25,180.97
1940	30,430.97
1941	8,900.00
1942	5,900.00

The loans were repaid by JMC and charged to Anthony's personal account.

mony that his business was in need of money and that he had put all the cash he could obtain into his business. He also testified that from 1937 to 1945 all his business income, all his salary, and all other income, went into the Motor Company's checking account, and that anything he might have received would be shown in his personal account on the Motor Company's books. The books eliminate the possibility of a cash hoard accumulated in the manner described. Later Mr. Jaeger also alleged receipt of loans from his daughters, who had been small stockholders and employees of the Motor Company. His daughter Edna's affidavit alleged that she lent her father about $6,800 during the period 1941 through 1946. His daughter Wilma's affidavit alleged a loan of $3,000 during the years between 1931 and 1941. His daughter Clara testified to loans during the years 1941 to 1946.

At the trial, it was conceded that Edna did not lend her father any money during the years 1941 through 1946. Wilma was paid about $4,700 during the period 1931 through 1944, when she was on the Motor Company payroll. Clara's earnings for 1941 were about $1,100; for 1942 about $4,800, and an average of about $2,500 for 1943 through 1946.

None of these alleged loans, or payment thereon, were evidenced by any record. The Tax Court considered the demeanor of the daughters as witnesses and the pertinent evidence of their earnings, etc., and found that no cash in the form of loans from his daughters was in Mr. Jaeger's possession at the time immediately prior to or during the years in issue.

The Tax Court further found that Mr. Jaeger's major source of income from 1937 through 1944 was his salary from the Motor Company and his rents from his real

estate holdings, which were primarily leased to the Motor Company. His salary and rental income were credited to his account on the Motor Company books, and his federal and state taxes, and substantial amounts of his personal living expenses were paid by the Motor Company's checks and charged to his personal account. Mr. Jaeger's major sources of cash from 1937 through 1944 were found to comprise about $16,500 in Motor Company checks, and about $1,700 in checks payable to Mrs. Jaeger and charged to Mr. Jaeger's account. Mr. and Mrs. Jaeger deposited $2,638.18 in a savings account in 1943 and 1944. The Tax Court found that Mr. Jaeger had about $18,200 in cash available during the years 1937 through 1944, out of which he made the above deposit. This left about $15,600 to pay his food bills and other personal expenses not covered by the Motor Company checks for the years 1937 through 1944.

The Tax Court found that Mr. Jaeger's cash on hand was as follows:

12/31/44	$ 500
12/31/45	500
12/31/46	2,500
12/31/47	3,000
12/31/48	3,000

There was evidence to support the Tax Court's finding that the cash on hand as of December 31, 1944, had been only $500. Thus on the basis of the net worth valuation, there was evidence of substantial unreported income in each of the years in issue.

The Commissioner contends that the petitioners stipulated that any unreported income of Mr. Jaeger or of the Motor Company was solely the result of unreported

profits on sales of automobiles of the Motor Company.[5] The petitioners argue that this constitutes a misconstruction of the stipulation: that its purpose was only to limit the proof of sources of unreported income available to the Commissioner, and not to admit any source of unreported income. The interpretation placed on the stipulation by the Commissioner and by the Tax Court, however, was entirely reasonable in the light of the language used.

Our scrutiny of the record in this case discloses evidence that in 1945 and 1946, when automobile sales prices were regulated by the Office of Price Administration, sales were being made by the taxpayers at prices higher than allowed by OPA regulations. The books of the Motor Company did not always reflect the total sales prices. Mr. Jaeger testified at one point that $11,400, which he placed in his safety deposit box on January 2, 1946, the same day he opened it, was composed of unrecorded over-invoice cash payments. On further examination, he denied that these over-invoice payments were received in 1945, and asserted that they were all received in 1946. When Mr. Jaeger was reminded of the date in question—January 2, 1946—his counsel then said that the witness was confused and Mr. Jaeger said that he now recollected that this money had been put into the box at different times, so that he had reached a total figure of

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[5] The stipulation reads:

"31. The issue of alleged unreported income of Jaeger Motor Car Company for the years 1945 to 1948, inclusive, results solely by reason of alleged unreported profits on sales of new and used automobiles.

"32. The alleged unreported income of Anthony A. Jaeger is solely as a result of alleged unreported profits on the sales of new and used automobiles by Jaeger Motor Car Company which profit the said Anthony A. Jaeger allegedly diverted to his own uses and purposes."

$11,400 by 1949. At other times during the investigation and trial, Mr. Jaeger denied that the Motor Company ever received the over-invoice profits and further denied that he or the Motor Company received any over-invoice profits in 1947 or 1948. One of the salesmen testified that he himself had kept the overage on sales he had made, and that Mr. Jaeger had prohibited the practice in 1947 and 1948. In his initial examination as an adverse witness for the Commissioner, this same salesman witness had testified that he turned in, to Mr. Jaeger, all over-invoice money received by him. The issue of credibility was, of course, for the Tax Court which had the opportunity of seeing and hearing the witnesses.

Thus, there was substantial evidence, which, if believed, supported the Tax Court's finding that same portion of the understated income in the years in issue was secured through a continuing practice of over-invoice sales.

The stipulation of facts in this case included the following:

> "25. During the year 1945 Jaeger Motor Car Company paid a fine to the office of Price Administration for violation of their regulations in the amount of $850.00 and deducted such amount on the Federal Corporation return filed by it for such year. Petitioner Jaeger Motor [*sic*] Company concedes that the adjustment disallowing as a deduction is a proper one."

The Tax Court referred to this OPA fine in its opinion. The petitioners then sought to reopen the case for submission of the record in connection with the aforementioned fine. They asserted that the full record would have shown the $850 to be a civil judgment entered on a stipulation made solely for the purpose of that case

which related to overcharges in 1944, not in 1945, and that such overcharges were per invoice and not over-invoice. The documents made a part of the petitioners' Appendix in the case before us show that the Administrator of the Office of Price Administration had filed a complaint in the U.S. District Court, against Jaeger Motor Car Company, and, on stipulation between the parties, made on October 15, 1945, had recovered an agreed judgment of $850 on October 16, 1945, for violation of the OPA regulations. The judgment order in that case also restrained Jaeger Motor Car Company, its officers, agents, etc., from sales of automobiles in excess of the established maximum prices. The documents do not establish that the suit referred to overcharges in 1944, nor that these were per invoice overcharges. In any event, there was no showing that the record in the OPA case constituted newly discovered evidence. In the absence of some such justification for re-opening the case, we cannot regard the Tax Court's denial of the motion as error.

In 1946, 1947 and 1948, automobiles were billed to members of Mr. Jaeger's family. Although the family member never paid for the automobile, his personal account on the Motor Company books would be charged and then credited, sometimes the same day, to reflect payment when the automobile was ultimately sold. One reason offered for this practice was the need to show a low inventory on hand to prevent decrease in the Motor Company's allotment of new automobiles. However, one such automobile was billed to a family member several days after it had actually been sold to a customer of the Motor Company. In that instance, a cash profit in excess of $500 was concealed. The automobile trade-in on that same transaction was ultimately

sold to another customer at a profit in excess of $700 which never appeared on the books of the Motor Company. The evidence supports the Tax Court's conclusion that the practice was devised to prevent the appearance of these profits on the Motor Company's books. The Tax Court found that the profits on such sales were income to the Motor Company, as there was no bona fide sale of the automobiles when they were charged to Mr. Jaeger's relatives. Testimony of some of the ultimate purchasers indicated that they purchased these automobiles on the Motor Company's premises and believed that they were dealing with the Motor Company, which, in at least one case, issued a warranty on the automobile. Salesmen witnesses indicated that they never checked to ascertain whether they were selling an automobile which was listed as part of the Motor Company's inventory or which was listed as belonging to a member of the Jaeger family.

On December 31, 1936, Mr. Jaeger entered into a one-year lease of his property at 1823 N. 27th Street, Milwaukee, Wisconsin, with the Motor Company as lessee, at $500 per month, the lessee to pay all real estate taxes and insurance, and to keep the premises in good repair except for reasonable use, accidental damage and the like. December 31, 1937, the Motor Company's directors authorized another lease, otherwise on the same terms, for $250 per month. No formal lease was executed. The Motor Company occupied the premises and paid $250 per month through 1939. In 1939, an addition to the building was paid for by the Motor Company and charged to Mr. Jaeger's personal account. In 1940, the directors authorized a monthly rental of $250 for January through March and $500 for the rest of the year. Still without formal lease, the Motor Company continued to pay $500

monthly, plus taxes and insurance premiums through the years in issue. Late in 1946, a builder was employed to correct the foundation and add a second floor to the main building. As the work progressed, bills totalling $16,867.56 were paid by Motor Company check and charged to Mr. Jaeger's personal account. On November 30, 1947, the charges of $16,867.56 were transferred from Mr. Jaeger's personal account to a Company account: "leaseholds and improvements." One of the salesmen-stockholder witnesses testified that on May 6, 1947, Mr. Jaeger had promised not to increase the rent if the Motor Company would take over these liabilities. The Tax Court found that the lease, however, was terminable by either party on 30 days' notice at the end of any year. Mr. Jaeger testified that it was his understanding that he could terminate the lease at any time on 30 days' notice. Thus the controlling stockholder, Mr. Jaeger, had the power to regain possesson of the improved property, and an asset paid for by the Motor Company was made available for Mr. Jaeger to take if he desired. Meanwhile the Motor Company had never declared a cash dividend although it had a substantial earned surplus.[6]

On December 8, 1947, the directors of the Motor Company met to consider a cash dividend. Mr. Jaeger's certified public accountant had written to warn of accumulation of surplus and the possibility of assessment on un-

[6] The Tax Court found that the company's earned surplus, as reported on its income tax returns, was as follows:

December 31, 1945	$ 44,341.53
December 31, 1946	108,017.47
December 31, 1947	198,758.19
December 31, 1948	326,123.91
December 31, 1949	394,283.99
December 31, 1950	514,576.08
December 31, 1951	555,491.35

distributed profits under the Internal Revenue Code of 1939, § 102. Checks for dividends of $25,000 had already been made out and were noted on the Company books. The minutes show that the liability for adding a second story to the structure was transferred from Mr. Jaeger's personal account and assumed by the Motor Company. There was a controversy with the contractor as to part of the sum due. $10,867.56 was transferred from Mr. Jaeger's personal account and another $10,075.52 was earmarked for payment when the claim was settled. This sum was added to the "leaseholds and improvements" account. When the claim was settled on December 31, 1947, the "leaseholds and improvements" account was reduced to $3,575.52. At the meeting on December 8, 1947, $100,000 was earmarked for building expansion and remodeling, and another $100,000 was thought necessary for working capital. The directors therefore decided against a cash dividend for 1947. In the years from 1947 through 1951, the Motor Company paid in excess of $150,000 for improvements to Mr. Jaeger's realty.[7]

[7] The parties stipulated as follows:

"1. That during the years 1947 to 1951, inclusive, Anthony A. Jaeger was the owner of certain property known as 1823-27 North 27 Street and 1835-49 North 27 Street, Milwaukee, Wisconsin. Jaeger Motor Car Company, during the years 1947 to 1951, inclusive, expended the following amounts for capital improvements to this property, a portion of which was allocated on the books and records of account of Jaeger Motor Car Company to the "leasehold improvements" account and a portion of which was allocated to the "'building maintenance" account but which were in fact capital expenditures, as follows:

Year	Capital Items on Books	Expended Books but representing capital items	Total
1947	19,370.48	6,761.44	26,131.92
1948	61,088.46	9,888.96	70,977.42
1949	43,088.14	893.15	43,976.29
1950	11,111.76	375.00	11,486.76
1951	2,095.00	—	2,095.00

Several commercial offices were made available by the alterations, which the Motor Company sublet at $75 to $100 monthly, retaining the rents collected.

The Tax Court concluded that the improvements paid for by the Motor Company constituted dividend income to Mr. Jaeger in the years when made. With this we agree. A dividend may be made in cash or in property. Internal Revenue Code of 1939, § 115(a). Disbursement of corporate earnings and profits may constitute dividend income to stockholders although no dividend has been formally declared, and such disbursement is not made proportionate to the holdings of the stockholders. *Louis H. Zipp* v. *C.I.R.*, 28 T.C. 314, 329 (1957), affirmed 6 Cir., 1958, 259 F. 2d 119, cert. den. 359 U.S. 934; *Paramount-Richards Theatres* v. *C.I.R.*, 5 Cir-1946, 153 F. 2d 602, 604.

The Jaeger Finance Company began operations May 1, 1946, to finance automobile sales to the Jaeger Motor Car Company's customers. The Finance Company accrued interest payable on obligations to Mr. and Mrs. Jaeger, in 1948 and 1949. These amounts were paid in 1950. The Finance Company had funds from which the Jaegers could have taken their interest as it accrued. There was sufficient evidence to support the Tax Court's finding that the accrued interest was constructively received by the Jaegers in the years it was accrued payable to them. *C.I.R.* v. *Arnold*, 1 Cir., 1945, 147 F. 2d 23.

On July 14, 1941, Mr. Jaeger, individually, entered an agency agreement with Motors Insurance Company, which continued through the years in issue. The Insurance Company agreed to pay Mr. Jaeger a commission on all insurance business accepted from him. The poli-

(7 Cont.)

cies were in fact sold by Mr. Jaeger and other employees of the Motor Company, under Mr. Jaeger's agency agreement. Mr. Jaeger assigned his right to the commissions to the Motor Company and the Finance Company, neither of which was a party to the agency agreement. It is conceded that under Wisconsin law, a corporation may not act as an insurance agent. Wisconsin Statutes, § 209,04.

The Tax Court properly held that the commissions were taxable income to Mr. Jaeger although he had made an anticipatory transfer of the income to the two companies. *Lucas* v. *Earl*, 281 U.S. 111, 115 (1930).

The Tax Court had before it evidence of substantial understatements of income; numerous over-invoice payments, and sales of automobiles purportedly, but not in fact, owned by Mr. Jaeger's relatives; all of which produced income which was not reported on the books or tax returns of the Motor Company or of Mr. Jaeger. There were a series of evasive, contradictory explanations presented to the Commissioner of Internal Revenue and to the Tax Court. There was sufficient evidence of a clear and convincing nature to justify the Tax Court's finding that Mr. Jaeger, and other officers of the Motor Company, were knowingly engaged in concealment of income from 1945 through 1948, and that fraud, with intent to evade tax, had been established with respect both to Mr. Jaeger and the Motor Company, for all four years. *Davis* v. *C.I.R.*, 7 Cir., 1956, 239 F. 2d 187, 191, cert. den. 353 U.S. 984, and other cases therein cited. Therefore, the Statute of Limitations did not bar assessment of deficiencies for the year 1945.

It would unduly lengthen this opinion to no good purpose to discuss all the numerous facets of the case and

all the points raised by the parties in their briefs and on oral argument. We have carefully considered each of these in arriving at our conclusion that the Tax Court's decisions should be AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.